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In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN H. WILLIAMS, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent's proposed approach asks this Court to go far beyond enforcement of the rules promulgated to govern grand jury procedures. He asks this Court to devise a broad obligation—without roots in the common law or the Fifth Amendment—applicable to a prosecutor's evidentiary presentations before the grand jury. This alteration of grand jury practice has no foundation in any statute or Rule, yet it would be enforced by the sanction of dismissal of the indictment.

If this new affirmative duty for grand jury proceedings is to be created, it should be done by Congress or through the process for devising and amending the Rules of Criminal Procedure. The creation—outside of that process—of such an obligation with

respect to the prosecutor's presentations to the grand jury is not appropriate. See Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433, 1492-1494, 1508-1510 (1984).

1. Respondent contends (Br. 22-31) that the role of the grand jury to protect against unfounded prosecutions would be undermined without a judicially enforceable rule that prosecutors must present substantial exculpatory evidence to the grand jury. He concedes that there is no requirement that a prosecutor present merely "exculpatory" evidence, but urges a narrower rule requiring the presentation of known exculpatory evidence that directly negates guilt. That rule is necessary, he argues, in order to ensure that the grand jury is "independent and informed." Br. 25, quoting *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962).

a. Respondent's rule has no support in the history of the grand jury system. While the grand jury has the dual responsibility to determine "whether there is probable cause to believe a crime has been committed" and to protect "citizens against unfounded criminal prosecutions," *United States* v. *Calandra*, 414 U.S. 338, 343 (1974); *Stirone* v. *United States*, 361 U.S. 212, 218 n.3 (1960), it has never been the law that the grand jury is required to hear the defendant's side of the case. G. Edwards, Jr., *The Grand Jury* 140-41 (1906) (collecting authorities showing "[n]either the defendant nor any of his witnesses will be permitted to appear before the grand jury").

The requirement that the grand jury be "independent and informed" has traditionally meant that

the grand jury must have broad latitude to subpoena and consider whatever evidence it needs to determine whether a crime has been committed. See *United States* v. *R. Enterprises, Inc.*, 111 S. Ct. 722, 726 (1991) ("The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred."); *United States* v. *Calandra*, 414 U.S. at 344 ("The grand jury's investigative power must be broad if its public responsibility is adequately to be discharged."). If it is not satisfied by the evidence that the prosecutor puts before it, the grand jury has the right to ask questions, to call for additional evidence, or to reject the proposed indictment. A court, however, is not authorized to second-guess the grand jury's determination to return an indictment because the court is concerned that the grand jury did not hear enough evidence. If respondent's claim were accepted, it would seriously undermine the principle that the grand jury is a body that acts "independently of either prosecuting attorney *or judge*." *Stirone*, 361 U.S. at 218 (emphasis added); see Pet. Br. 21-22.

b. Respondent understates the costs that his rule would impose on the administration of criminal justice. The rule that respondent advances is quite different from the internal policy adopted by the Department of Justice [1] or ethical principles promul-

[1] See United States Attorneys' Manual ¶ 9-11.233, at 18 (1990) (requiring disclosure to the grand jury when the prosecutor is "personally aware" of substantial exculpatory evidence that "directly negates * * * guilt"), quoted at Pet. Br. 27-28. In the Department's view, that standard was not remotely met by the evidence on which respondent relies. That the court of appeals thought otherwise underscores the gap between the law in the Tenth Circuit and the Department's internal policy.

gated by some professional associations.[2] It is one thing to say that a particular practice is preferred; it is another to say that its omission is legal error. Moreover, respondent's rule is enforceable, not through internal or professional discipline, but through dismissal of an indictment by a district court. In evaluating the impact of respondent's proposed rule, the fact that it is administered by a court is critical.

A court cannot enforce compliance with such a duty without a detailed and burdensome inquiry into the grand jury's functions. District courts do not monitor the progress of grand jury investigations. Accordingly, when a defendant moves to dismiss his indictment on the ground that the prosecutor had in his possession but did not present "substantial" exculpatory evidence, the court generally comes to that motion cold, without any background as to the details of the offenses charged. The court must familiarize itself with the documents and witnesses the grand jury considered, and then weigh the probative value of that material against the evidence the defendant claims is substantial and exculpatory.[3] The

[2] See Resp. Br. 29; National Ass'n of Criminal Defense Lawyers Br. 22-23. For example, the American Bar Association, in a task force report setting forth ethical guidelines for prosecutors, proposed that "[n]o prosecutor should knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt." 1 ABA *Standards for Criminal Justice*, ch. 3—The Prosecution Function § 3-3.6(b) at 3.49 (2d ed. 1980). The ABA's standards, however, were "not intended as criteria for the judicial evaluation of alleged misconduct of the prosecutor to determine the validity of a conviction" but "as a guide to honorable professional conduct and performance." § 3-1.1(e) at 3.6.

[3] Here, for example, the court had to review a five-volume transcript of a deposition that respondent gave in his bankruptcy proceeding; unedited transcripts of four grand jury witnesses; and material that the government furnished to

court also must inquire whether the prosecutor knew of the withheld evidence and understood its asserted exculpatory value. There will frequently be disputes about the significance of the withheld evidence and whether its substance was presented to the grand jury through other witnesses.[4] And, assuming the evidence is actually helpful to the defendant and is not found in the grand jury record, the ultimate judgment a court must make is whether, in light of all of the facts, the withheld evidence is "substantial" to the point of negating guilt, as opposed to "merely" exculpatory.

In short, the court would have to conduct a minitrial on the defendant's guilt of the crimes charged and the prosecutor's culpability for failing to present exculpatory material to the grand jury. Yet, this Court has recognized that "[a]ny holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and

respondent in compliance with *Brady* v. *Maryland*, 373 U.S. 83 (1963), including portions of interview statements of 13 witnesses. Pet. App. 16a-17a. Respondent also relied heavily on the theory that his general ledgers, tax returns, and other financial statements were improperly omitted from the grand jury presentation, Resp. C.A. Br. 16-21; presumably the court was expected to review those as well.

[4] In this case, it was a major point of contention whether the grand jury heard the substance of respondent's defense. For example, respondent claimed that the grand jury should have heard about the procedures that his accountants, the Horter Company, used in preparing his financial statements. Resp. Br. 12-13. The government replied that the grand jury did hear testimony from both a current and former Horter accountant, and those witnesses described in detail the methods and sources used in preparing respondent's statements. Gov't C.A. Br. 17-19.

expeditious administration of the criminal laws." *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973); *Costello* v. *United States*, 350 U.S. 359, 363 (1956) (rejecting procedures that would require "before trial on the merits * * * a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury"); *Calandra*, 414 U.S. at 350 (rejecting rule that would transform grand jury proceedings "into preliminary trials on the merits" because the delay "might be fatal to the enforcement of criminal law."); *R. Enterprises, Inc.*, 111 S. Ct. at 727 (same).[5]

Respondent contends (Br. 28) that experience in the federal system demonstrates that the court of appeals' rule would not be burdensome. In fact, however, if the court of appeals' rule were applied in federal courts throughout the country, its costs would be substantial. Defendants would have a huge incentive to attack the prosecutor's conduct before the grand jury if such motions could result in dismissal of the indictment or, at minimum, discovery or disruption of the prosecution's case. Adoption of the court of appeals' rule would predictably fuel widespread litigation over the adequacy of the prosecutor's evidentiary submissions.[6] Yet, experience shows that

[5] The motion in this case is unlike motions for judgment of acquittal, appellate challenges to the sufficiency of the evidence, or post-trial motions alleging nondisclosure of exculpatory evidence. Those determinations are made *after* a full trial and development of the facts, unlike the determination made here *before* trial.

[6] One author recommended, even before the Tenth Circuit adopted its rule, that defense "[c]ounsel * * * should never hesitate to bring the government's failure to present exculpatory evidence to the court's attention. The court may conclude that the evidence omitted was substantial and may have

all but a handful of such claims will be found meritless. Respondent and his amicus have cited fewer than ten cases that supposedly involve a dismissal because of the prosecutor's failure to present substantial exculpatory evidence. Yet from 1980 through 1989, the federal system convened 7,529 grand juries for a total of 110,106 sessions. These grand juries returned 209,587 indictments against 336,796 defendants.[7] Even assuming that the cases cited by respondent turned on the omission of significant exculpatory evidence,[8] they make up a negligible fraction of the indictments returned in the federal system.[9]

led the jurors not to indict, and therefore grant your motion." J. Lawless, *Prosecutorial Misconduct* § 2.09, at 47-48 (1985).

[7] Administrative Office of the United States Courts, *1987 Grand and Petit Juror Service in the United States District Courts* 1 (1987); Administrative Office of the United States Courts, *1989 Grand and Petit Juror Service in the United States District Courts* 1 (1990).

[8] Typically, those cases involve far more. For example, in *United States* v. *Lawson*, 502 F. Supp. 158, 162-163 (D. Md. 1980), the prosecutor repeatedly asked misleading questions of a witness, contrary to the evidence, in order "to create a false impression on the grand jury." In *United States* v. *Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979), the failure to present exculpatory evidence was but one of a lengthy list of alleged misconduct, such as prosecutorial conflicts of interest and grand jury testimony by the prosecutor, that led to dismissal. In *United States* v. *Isgro*, 751 F. Supp. 846, 852 (C.D. Cal. 1990), appeal pending, No. 90-50531 (9th Cir.), the dismissal was based in the alternative on the court's view that the prosecutor had made false statements to the defendants and to the court denying the existence of exculpatory material, which the court characterized as "outrageous governmental misconduct."

[9] Another cost of respondent's proposed rule would be reflected in the protracted grand jury proceedings that would result from efforts by prosecutors to head off challenges based

Against that background, the benefits, if any, that would result from respondent's rule are far too remote and speculative to justify the burdens it would impose.

2. Respondent argues (Resp. Br. 31-43) that this case is unique among the reported appellate decisions addressing the question whether the prosecutor erred in failing to present exculpatory evidence to the grand jury; this case, respondent urges, involved the failure to disclose "substantial exculpatory evidence," while the other cases involved evidence that was merely "exculpatory." In fact, this case well illustrates the difficulty courts would have in applying respondent's "substantial exculpatory evidence" test to particular grand jury records.

The court of appeals repeatedly blurred the line that respondent attempts to draw. Although relying on the statement in *United States* v. *Page*, 808 F.2d 723, 728 (10th Cir.), cert. denied, 482 U.S. 918 (1987), that "a prosecutor has the duty to present substantial exculpatory evidence to the grand jury," the court went on to adopt the far more rigorous re-

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on the failure to present exculpatory evidence. See, *e.g.*, *United States* v. *Law Firm of Zimmerman & Schwartz, P.C.*, 738 F. Supp. 407 (D. Colo. 1990) (prosecutor felt compelled to inquire whether defense counsel wished to have evidence submitted to the grand jury, and presented that evidence in order to avoid a motion for dismissal), aff'd *sub nom. United States* v. *Brown*, 943 F.2d 1246, 1257 (10th Cir. 1991); *United States* v. *Flomenhoft*, 714 F.2d 708, 711 (7th Cir. 1983) (defendant requested prosecutor to call 10 defense witnesses before the grand jury), cert. denied, 465 U.S. 1068 (1984); cf. *United States* v. *Gary*, No. CR90-0101-W (W.D. Okla. July 24, 1990) (court dismissed indictment because prosecutor did not present to the grand jury the testimony of "strawbuyers" in housing fraud scheme who would have said that they believed the transactions were lawful).

quirement that "the grand jury must receive *any* information that is relevant to *any* reasonable theory it may adopt." It held that the prosecutor should have disclosed the evidence omitted from the grand jury record in this case because it was "*consistent* with the possible theory that defendant simply did not intend to mislead the banks." Pet. App. 5a, 8a, 11a (emphasis added).[10] If these statements are consistent with the standard articulated in *Page*, that that standard is an extraordinarily broad one.

The facts of this case undermine respondent's submission that courts can easily apply a "substantial exculpatory evidence" test. This case involves charges of bank fraud. The indictment alleges that respondent obtained various loans through the use of financial statements that overstate his "current assets" and the "interest" he earned; both misstatements relate to investments that respondent made in venture capital companies. The government's theory is that the statements created a false impression of respondent's wealth by listing notes from those companies as "current assets" (J.A. 14, 24, 34), when respondent knew that, based on the negative net worth and riskiness of those companies, the notes would not be paid within one year—the common understanding of the term "current asset." The statements also created a false impression of respondent's earnings by indicating that the venture companies were a source of interest income for respondent (J.A. 44-46), while not disclosing that that "income" consisted simply of

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[10] Respondent's articulation of the rule manifests the same degree of breadth. While insisting that the rule applies only to substantial evidence "negating guilt," Resp. Br. 42, he also asserts that "[t]he grand jury must be apprised of all relevant evidence * * * so that its judgment may be truly informed." *Id.* at 27.

funds that respondent lent to the companies specifically so that they could return it to him as "interest." Gov't C.A. Br. 6-9.

Respondent argues that the grand jury was deprived of evidence in the government's possession that tended to show he had no intent to defraud, such as financial statements and general ledgers prepared by his accountants consistently reporting the notes receivable at their face value. Respondent also points to his bankruptcy deposition in which he stated that some venture capital investments pan out despite negative financial results in their early years, and that one investment he made in such a company did eventually succeed. See Resp. Br. 9-12.[11] In our view, the district court was correct in its initial denial of respondent's motion to dismiss. The court concluded that respondent had identified "individual items of potentially exculpatory evidence," but had not established "substantial exclusion of exculpatory evidence from the purview of the Grand Jury." Pet. App. 17a. Respondent's evidence does not "negate" guilt; it merely reflects a defense explanation that the petit jury could either accept or reject in determining whether respondent had the requisite intent to defraud.[12] In making that defense, respondent's personal credibility would be vital; yet it cannot be assessed by reading a deposition transcript. The grand jury was no more required to hear that evidence than it was required to invite respondent and his supporting cast of witnesses to testify.

[11] Respondent states (Br. 21) that the government in this case obtained the omitted evidence through its own investigation, not from defense counsel. It is hard to see the relevance of that observation. Under respondent's theory, the prosecutor has a disclosure duty when he knows of the evidence; it would not matter whether he learned of the evidence through his own investigation or through defense counsel's efforts.

[12] For example, evidence that respondent and his accountants consistently reflected his notes receivable at face value on internal records does not "negate" the fact that it was misleading to portray those notes as current assets *to the banks* without revealing the poor financial history and negative net worth of the companies. Similarly, evidence that respondent paid taxes on the interest he received (Resp. Br. 13) does not detract from the fact that it was misleading to tell the banks that those payments represented "interest income" without revealing that the money actually came from respondent's pocket and did not represent a independent source of funds.

The dispute about this evidence is typical of those that would be likely to arise under the court of appeals' rule. The articulation of the "substantial exculpatory evidence" standard and its application to particular facts would force the court into gray factual areas, in which it would frequently be debatable whether the evidence is exculpatory to any significant degree, and whether the grand jury heard its substantial equivalent. There is no reason to believe that any formulation of the rule could avoid the need for detailed factual inquiries by the court into all of the evidence that tends to prove or disprove the defendant's guilt.

3. Finally, respondent claims (Br. 43-49) that under our aanlysis of the proper relationship between the court and the grand jury, this Court's definition of the standard of prejudice required to dismiss an indictment for prosecutorial misconduct would be rendered "meaningless." See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250 (1988). As respondent admits (Br. 46), *Bank of Nova Scotia* "did not involve a prosecutor's decision to withhold substan-

tial exculpatory evidence from the grand jury"; it simply defined the degree of prejudice necessary to justify dismissal of the indictment once misconduct is found. This case involves the distinct issue of whether it is legal error in the first place when a prosecutor elects not to present exculpatory evidence to the grand jury.

Violations of statutes or rules governing the grand jury's functions may in some instances constitute misconduct, as may particularly serious examples of prosecutorial overreaching designed to deceive the grand jury. Pet. Br. 16 n.4, 22 n.8. The primary vehicle for defining such violations, however, is through amendments to the Federal Rules of Criminal Procedure. Prosecutors are "bound by a few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions." *United States* v. *Mechanik*, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring). The rule that respondent advocates is not among them.

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

KENNETH W. STARR
Solicitor General

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